

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

JULY 10 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2007-0371-PR
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
SCOTT CARLTON WILLOUGHBY,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20032835

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Robert J. Hirsh, Pima County Public Defender
By Kristine Maish

Tucson
Attorneys for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 Pursuant to a plea agreement, petitioner Scott Willoughby pled guilty to sexual conduct with a minor and attempted sexual assault, arising from incidents involving his stepdaughter. The trial court sentenced Willoughby to a partially aggravated prison term of eight years on the first count and to lifetime intensive probation on the second count. The trial court found the following constituted aggravating circumstances: Willoughby's betrayal of his wife's and the victim's trust, his lack of insight into his actions, the significant emotional and physical harm to the victim, and the protracted period of the abuse. Willoughby filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., more than two years after he was sentenced and then filed his petition nearly one year after that.

¶2 Although the trial court found that Willoughby's post-conviction claim was untimely and that he had not presented a valid excuse for the late filing, it nonetheless addressed the following claims, which he raised in his petition: the court had relied on improper aggravating circumstances and had failed to consider the "overwhelming" evidence in mitigation; Willoughby is entitled to relief under *Blakely v. Washington*, 542 U.S. 296 (2004); and his trial attorneys were ineffective. The trial court denied relief on all of Willoughby's claims, and this petition for review followed. We will not disturb a trial court's ruling on a petition for post-conviction relief absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶3 We conclude the trial court properly denied post-conviction relief because Willoughby's notice and petition were untimely and he failed to assert any basis for exemption from the applicable time limits. Willoughby had until June 3, 2004, ninety days after he was sentenced on March 5, 2004, to file a notice of post-conviction relief. *See* Ariz. R. Crim. P. 32.4(a). He did not file his notice until June 13, 2006, more than two years after the deadline. Because he did not file a timely notice of post-conviction relief, his convictions became final on June 3, 2004. *See generally State v. Towery*, 204 Ariz. 386, ¶ 8, 64 P.3d 828, 831-32 (2003) (conviction final when availability of appeal or certiorari exhausted).

¶4 Willoughby stated in his notice of post-conviction relief that his claim was based on “newly discovered material facts”¹ pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Relying on Rule 32.1(f), Ariz. R. Crim. P., he argued in his petition for post-conviction relief that his notice of post-conviction relief was untimely through no fault of his own because his trial attorneys were ineffective by having failed to “adequately advise him concerning his rights of review, and/or file a Notice of Post-Conviction Relief on his behalf.” Notably, Willoughby received both written and oral notice at sentencing that he had the right to file a notice of post-conviction relief within ninety days. In its order denying

¹Although Willoughby designated this as a claim of newly discovered evidence, it appears he may have intended to characterize it as a significant change in the law. In any event, either claim would fall within the exceptions to preclusion pursuant to Rule 32.1(d) through (h) and Rule 32.2(b), Ariz. R. Crim. P.

post-conviction relief, the trial court correctly concluded that, because “[t]he Court [had] made [Willoughby] aware of his Rule 32 rights . . . [his] claimed ignorance of his rights is not a valid excuse for not timely filing for relief.”

¶5 Although Willoughby obliquely suggests he would have timely sought post-conviction relief if his attorneys had advised him that he had “potentially meritorious claims to appeal,” he did not develop this claim in his Rule 32 petition. In Willoughby’s affidavit, which he attached as an exhibit to his Rule 32 petition, he attested that he had failed to file a timely notice of post-conviction relief “due to [his] being untrained and unknowledgeable in the Law, Rules of Procedure and Court Practice and the limited legal materials available at the Department of Corrections.” Based on Willoughby’s affidavit and his pleadings, the true focus of his ineffective assistance claim is that counsel simply did not inform him generally that he had the right to seek post-conviction relief. But even assuming that to be true, because the court informed Willoughby of his post-conviction rights, he was not prejudiced by counsel’s alleged deficiency, and his ineffective assistance claim necessarily fails. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (to state colorable claim of ineffective assistance, defendant must show both counsel’s performance was deficient under prevailing professional norms and that counsel’s performance prejudiced defendant); *see also State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) (if defendant fails to make sufficient showing on either prong of *Strickland* test, court need not determine whether other prong was satisfied).

¶6 Once the trial court found Willoughby’s petition precluded based on untimeliness, it was not required to address the issues he had raised, although it did so in any event.² Because we agree with the court that the claims are precluded as untimely, we need not address the propriety of the court’s denial of relief of the claims on their merits, with the exception of Willoughby’s *Blakely* claim.

¶7 Willoughby essentially contends on review, as he did below, that he is entitled to relief based on *Blakely* because a judge, rather than a jury, found the aggravating circumstances used to justify his partially aggravated prison term. The trial court found that *Blakely* does not apply retroactively to Willoughby because his convictions were final when *Blakely* was decided, and *Blakely* is not retroactively applicable. See *State v. Sepulveda*, 201 Ariz. 158, ¶ 4, 32 P.3d 1085, 1086 (App. 2001) (declining to retroactively apply *Apprendi*). Willoughby argues, however, that, if counsel had filed a timely notice of post-conviction relief, his case would not have been final when *Blakely* was decided, and *Blakely* would have applied to his case. See *State v. Cleere*, 213 Ariz. 54, n.2, 138 P.3d 1181, 1184 n.2 (App. 2006) (“*Blakely* applies to cases pending on direct review when *Blakely* was

²We note the statement at the end of the trial court’s ruling that the court had “not precluded [Willoughby’s] claim based upon untimeliness” appears to be internally inconsistent with its otherwise clear language at the beginning of the ruling that, absent a showing that Willoughby’s late filing was through no fault of his own, a showing he did not sustain, he had “exceeded the deadline for filing . . . and [was], therefore, precluded from filing for post-conviction relief.” It appears the court was trying to explain why it had addressed Willoughby’s claims, something it was not required to do in light of its ruling that his petition was untimely, and to perhaps point out that Willoughby had received the benefit of the court’s reasoning despite his untimely filing.

decided.”). However, as we have already found, Willoughby was not prejudiced by counsel’s conduct. Because Willoughby knew about his right to file a post-conviction claim, a right he chose not to exercise in a timely manner, he simply is not entitled to relief under *Blakely*. See *State v. Febles*, 210 Ariz. 589, n.4, 115 P.3d 629, 632 n.4 (App. 2005).

¶8 Willoughby alternatively argues he is entitled to be resentenced under *Blakely* because it does not announce a new rule of law but merely applies the holding established in *Apprendi*. He is essentially asserting *Blakely* should be retroactively applicable. He also contends that, even if *Blakely* did announce a new rule of law, it is a watershed rule and deserves retroactive application. However, because the Supreme Court has already decided *Blakely* does not apply retroactively to cases that are final, we need not revisit Willoughby’s arguments. See *Schriro v. Summerlin*, 542 U.S. 348, 355-56, 358 (2004).

¶9 Although we grant the petition for review, we deny relief.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

GARYE L. VÁSQUEZ, Judge